

85-948

APPENDIX

No. ....

Office - Supreme Court, U.S.

FILED

NOV 25 1983

ALEXANDER L. STEVAS,  
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT VANCE, D.O.

*Petitioner,*

vs.

STATE OF UTAH,

*Respondent.*

APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
STATE OF UTAH

JOHN A. BURGESS, Esq.  
58 Hillcrest Road  
Berkeley, California 94705  
(415) 658-5588

*Attorney for Petitioner*

## TABLE OF CONTENTS — APPENDIX

	<i>Page</i>
Appendix "A" — Notice of Hearing, Charge Order to Show Cause and Petition .....	1
Appendix "B" — Findings of Fact, Conclusions of Law and Recommended Order .....	21
Appendix "C" — Order of the Department of Regis- tration .....	27
Appendix "D" — Notice of Appeal to the District Court ..	28
Appendix "E" — Memorandum Opinion on Motion to Dismiss .....	29
Appendix "F" — District Court, Judgment and Order.....	30
and Memorandum Opinion on Appeal....	31
Appendix "G" — Notice of Appeal to Utah Supreme Court .....	34
Appendix "H" — Decision of the Supreme Court of Utah..	35
Appendix "I" — Denial of Rehearing — Supreme Court of Utah .....	57
Appendix "J" — Application for Stay Pending the Petition for Certiorari .....	58
Appendix "K" — Stay Order .....	60
Appendix "L" — Appeal Denied but Stay Is Granted.....	62

## **APPENDIX "A"**

### **NOTICE OF HEARING, CHARGE, ORDER TO SHOW CAUSE AND PETITION**

**ROBERT B. VANCE vs. PAUL T. FORDHAM,**  
Director of the Department of Registration, et al.

Notice is hereby given that on the 17th day of November, 1980, at the hour of 9:30 a.m., at 330 East Fourth South, Room 204, Salt Lake City, Utah, the Department of Registration of the State of Utah, will conduct a hearing to determine whether or not the license of Robert B. Vance to practice as an osteopathic physician and surgeon in the State of Utah should be revoked.

The hearing is based on the verified petition of Leslie Boulter, Investigator of the State of Utah, filed with the Department of Registration of the State of Utah, a copy of which is attached and by reference made a part hereof.

At the aforesaid hearing, Robert B. Vance may appear and be heard; he may be present evidence and show cause why his license to practice as an osteopathic physician and surgeon in the State of Utah should not be revoked.

Robert B. Vance is entitled to be represented by legal counsel.

Please conduct yourself accordingly.

DATED this 3rd day of October, 1980.

---

PAUL T. FORDHAM, DIRECTOR

## PETITION

L. B. Boulter, Investigator of the Department of Registration of the State of Utah, upon information and belief, represents as follows:

1. Robert B. Vance is duly licensed to practice osteopathy, as an osteopathic physician and surgeon in the State of Utah, having been issued license number 3263 by the Department of Registration.

2. That the license of an osteopathic physician and surgeon in Utah includes performing major surgery and the prescribing of drugs and medicines and is in every respect equivalent to the scope of the license of a medical doctor practitioner.

3. Robert B. Vance has been for several years last past and now is engaged in treating the general public in the field of the healing arts as a duly licensed osteopathic physician and surgeon with principal offices in Salt Lake City, Utah:

4. Section 58-1-25 (1) Utah Code Annotated 1953, as amended, provides that the Department of Registration may suspend or revoke any license if the holder has been guilty of unprofessional conduct and Section 58-12-36 (15) defines unprofessional conduct to include: "any conduct or practice, contrary to the recognized standards of ethics of the medical profession, or any conduct or practice which does or might constitute a danger to the health, welfare or safety of the patient or the public . . ."

5. Robert B. Vance is subject to the provisions of Section 58-12-36 (15) in matters of discipline of his professional conduct in the practice of medicine as the words "practice of medicine" are defined in Section 58-12-28 (14), Utah Code Annotated 1953, as amended, in that a doctor of osteopathy

is as much in the "practice of medicine" as is any M.D. and should, therefore, be subject to the same ethical standards of professional conduct.

6. That the conduct as hereinafter alleged, amounting to incompetency or "conduct or practice contrary to the recognized standards of the ethics of the medical profession or any conduct or practice which does or might constitute a danger to the health, welfare or safety of the patient or the public," is by legal implication included also in the definition of "unprofessional conduct" as set forth in Section 58-12-18, Utah Code Annotated 1953, as amended.

7. That Robert B. Vance has been guilty of acts of "unprofessional conduct," giving grounds for a hearing to determine whether disciplinary action should be taken, pursuant to law, and, if the facts and the law so justify, what the disciplinary action should be, in that he has done the following, whether personally or under his direction and control in the treatment of his patient, amounting to incompetency or conduct or practice contrary to the recognized standards of ethics of the medical profession or conduct or practice which does or might constitute a danger to the health, welfare or safety of each respective patient as hereinafter set forth:

A. On or about the 6th day of April, 1978, Robert B. Vance did undertake to treat Judith Sevcik on the basis of his diagnosis and her intentional misrepresentations dated April 19, 1978, that Robert B. Vance, furthermore, recommended and did thereafter provide inappropriate treatment for non-existent diseases in said Judith Sevcik; that the treatment for arteriosclerosis, which condition did not exist in said patient, was called "chelation therapy," a medical procedure not acceptable in the medical practice and the use of which can cause a danger to the health, welfare or safety of a patient.

B. On or about the 3rd day of January, 1977, Robert B. Vance did undertake to treat Gladys Page on the basis of his diagnosis that she was suffering from a condition known as hypoglycemia and as having a heart condition, as a result of having looked into her eyes (iris analysis). That the records on said Gladys Page indicate that Robert B. Vance did improperly diagnose the physical condition of said Gladys Page; that he used iridology as a method of diagnosing a heart condition which is not accepted medical practice and furthermore treated said Gladys Page for non-existent diseases or pathological conditions.

C. On or about the 4th day of December, 1978, Robert B. Vance did undertake to diagnose and treat Sheryl Drabner for hypoglycemia and other dysfunctions; that based on the records available of Robert B. Vance he misdiagnosed the condition of said Sheryl Drabner and treated her for non-existent maladies.

D. On or about the 14th day of January, 1971, Robert B. Vance did undertake to diagnose and treat Mel Edgar and on the basis of said diagnosis, Robert B. Vance did improperly treat said Mel Edgar by the use of steroids for a diabetic condition.

E. On or about the 29th day of July, 1971, and for several years thereafter Robert B. Vance did undertake to diagnose and treat Ileen J. Vigil; that in such treatments his records reveal that he used a method of treatment which is not medically accepted and proved; that he failed to properly diagnose the medical problems of said Ileen J. Vigil and furthermore failed to understand the diseases he purported to diagnose and treat with regard to this patient.

F. On or about the 5th day of September, 1974, Robert B. Vance did undertake to treat Vera Clinkscales; that based

on the records of Robert B. Vance he made an improper and erroneous diagnosis and thereafter treated Vera Clink-scales for non-existent maladies or dysfunctions.

G. On or about the 17th day of September, 1979, Robert B. Vance undertook to and did treat Mary Katsenevas for a condition he called "Diagetogenic Hypoglycemia" when in fact the results of her glucose tolerance test showed her to be within normal limits; that diagnosing said patient as being in the "latent diabetic zone" and as having "Reactive Hypoglycemia" and thereafter treating her accordingly, is false and misleading and contrary to the acceptable standards of practice.

H. Robert B. Vance undertook to treat and did treat Ruby Riddle, beginning on November 2, 1970, for "relative hypoglycemia secondary to chronic subclinical adrenal cortex hypofunction"; that thereafter Robert B. Vance treated said Ruby Riddle for arteriosclerosis, using a procedure called chelation therapy; that he also used a procedure called myoflex; that the clinical history and laboratory tests and said patient did not indicate a condition known as hypoglycemia and the use of chelation therapy to treat arteriosclerosis by removal of calcium in the body is not a medically accepted method or procedure and can result in harm or death to a patient.

I. Prior to December 1975, Robert B. Vance did for a period of approximately six years treat Lois Carter for hypoglycemia which he told her she had; that the laboratory tests on said Lois Carter did not indicate her having hypoglycemia; that Robert B. Vance provided other treatment consisting of wet pads placed under each shoulder blade, behind each ear and a pad with a strap across the forehead at which time Lois Carter was hooked or connected to a

machine which, according to the attendants of Robert B. Vance, was used for the relaxation of the adrenal gland. The treatment for hypoglycemia was for a non-existent condition and Robert B. Vance knew or should have known did not exist and the treatment with the wetpads and machine for the purpose of relaxing the adrenal gland was not then and is not now an accepted medical procedure by the standards of his profession and amounts to gross incompetency in the practice of osteopathy.

J. Between the period of January, 1972, and some time in the year 1974, Robert B. Vance did diagnose and treat Valine Stewart for hypoglycemia; that the laboratory tests of Valine Stewart did not indicate she was suffering from hypoglycemia; that Robert B. Vance knew or should have known that he was treating Valine Stewart for a non-existent physical condition, contrary to the accepted medical procedure and standards of his profession which conduct amounts to gross incompetency in the practice of osteopathy.

K. Between the dates of September 14, 1972, and August 20, 1973, Robert B. Vance did treat Renee Thomas for hypoproteinemia, hypothyroidism, hypochlorhydria, carbohydrate intolerance, prediabetes mellitus seen as reactive hypoglycemia, subclinical hypoadrenocorticism, anemia, hypogonadism and hyperlipidemia; the laboratory tests and clinical examinations did not indicate that Renee Thomas was suffering from all or any of said conditions; that Robert B. Vance knew or should have known that the treatments and charges made for the same were for non-existent maladies or dysfunctions and such conduct amounts to gross incompetency in the practice of osteopathy.

L. Beginning in the early part of June of 1974, Robert B. Vance did diagnose and undertake treatment of a patient

by the name of Janie Zeidner, for reactive hypoglycemia, mild diabetes mellitus, subclinical hypoadrenocorticism, hypogonadism and subclinical infection, among other health problems and body dysfunctions; the laboratory tests and clinical examinations did not indicate that Janie Zeidner was suffering from all or any of said conditions; that Robert B. Vance knew or should have known that the treatments and charges for the same were for non-existent maladies and body dysfunctions and such conduct amounts to gross incompetency in the practice of osteopathy.

M. Robert B. Vance undertook to treat a patient by the name of Lareene Wagenaar on or about September 17th, 1973, on the basis of the following diagnosis, which he made: "multiple mineral deficiencies and imbalances; latent diabetes mellitus; reactive hypoglycemia; subclinical hypoadrenocorticism, multiple food allergies." That Robert B. Vance treated said patient through to December 12, 1973, for the foregoing condition. The laboratory tests and clinical examination did not indicate said patient was suffering from any or all of the said conditions. Robert B. Vance treated said patient for non-existing health problems, maladies and dysfunctions. He knew or should have known that said treatments were not necessary and his conduct herein amounts to gross incompetency in the practice of osteopathy.

N. Robert B. Vance undertook to treat a patient by the name of Merelene Daniels beginning on or about October 23, 1973, on the basis of his following diagnosis: "Hypo-proteinemia; hypothyroidism; multiple mineral deficiencies and imbalances; diabetogenic hypoglycemia; subclinical hypoadrenocorticism; hypogonadism; hypercholesterolemia; hyperuricemia." He treated said patient for some or all of the above-stated conditions through to December 18, 1973.

The laboratory tests and clinical examination did not indicate said patient was suffering from any or all of said conditions. Robert B. Vance knew or should have known he was treating said patient for non-existent health problems, maladies and dysfunctions and his conduct therein amounts to gross incompetency on the practice of osteopathy.

O. Robert B. Vance undertook to treat a patient by the name of Cyndy Wagstaff on or about September 20, 1973, on the basis of his following diagnosis: "Multiple mineral deficiencies and imbalances; hypokalemia; latent diabetes mellitus; reactive and relative hypoglycemia; subclinical hypoadrenocorticism; hypochlorhydria vaginitis."

Robert B. Vance treated said patient through to October 19, 1973, for all or some of the foregoing stated conditions. The laboratory tests and clinical examination did not indicate said patient was suffering from any or all of the foregoing conditions. Robert B. Vance knew or should have known he was treating said patient for non-existent health problems, maladies and dysfunctions and his conduct therein amounts to gross incompetency in the practice of osteopathy.

P. Robert B. Vance undertook to treat a patient by the name of Sharon Canepari on June 7, 1973, on the basis of his following diagnosis: "Hypoproteinemia; hypothyroidism; multiple mineral deficiencies and imbalances, subclinical infection; hypogonadism; hypochlorhydria; diabetogenic hypoglycemia; subclinical hypoadrenocorticism."

Robert B. Vance treated said patient through November 28, 1973, for some or all of the foregoing stated conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from any or all of the fore-

going stated conditions. Robert B. Vance knew or should have known he was treating said patient for non-existent health problems, maladies and dysfunctions and his conduct therein amounts to gross incompetence in the practice of osteopathy.

**Q.** Robert B. Vance undertook to treat a patient by the name of Lance Canepari beginning on August 9, 1973, on the basis of the following diagnosis: "Hypoproteinemia; hypothyroidism, multiple mineral deficiencies and imbalances; reactive hypoglycemia; subclinical hypoadrenocorticism; pancreatic insufficiency."

Robert B. Vance treated said patient through September 28, 1973, for some or all of the foregoing stated conditions. The laboratory tests and clinical examination did not indicate said patient was suffering from any or all of the foregoing described conditions and his treating and charging said patient for treatment of non-existent maladies, conditions and dysfunctions amounts to gross incompetency in the practice of osteopathy.

**R.** Robert B. Vance undertook to treat a patient by the name of Milo J. Adams beginning on or about August 4th, 1973, on the basis of his following diagnosis: "Hypokalemia; hypochlorhydria; latent diabetes mellitus; diabetogenic and reactive hypoglycemia; subclinical hypoadrenocorticism; arterio scleritic heart disease."

Robert B. Vance treated said patient through to September 26, 1973, for the foregoing-stated conditions. The laboratory tests and clinical examination did not indicate said patient was suffering from any or all of the foregoing conditions. Robert B. Vance knew or should have known he was treating said patient for non-existent health problems, maladies and dysfunctions and his conduct therein amounts to gross incompetency in the practice of osteopathy.

S. Robert B. Vance did on March 6th, 1974, undertake to treat a patient by the name of Ferne S. Howell on the basis of his following diagnosis: "Hypoproteinemia; Hypothyroidism; Reactive Hypoglycemia; Subclinical Hypoadrenocorticism; Hypochlorhydria; Hypogonadism; Vaso-spasm; Hyperlipidemia; Subclinical Infection (Chronic); Allergy (multiple)."

Robert B. Vance treated said patient through to March 27th, 1974, for the foregoing stated conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from any or all of the foregoing conditions and he knew or should have known he was treating and charging for treatment of said patient for non-existent health problems, maladies and dysfunctions. Robert B. Vance's conduct therein amounts to gross incompetency in the practice of osteopathy.

T. Robert B. Vance did on January 7th, 1974, initiate laboratory tests and conduct clinical examination upon and thereafter undertake to treat a patient by the name of John Pfaff on the basis of his following diagnosis: "Hypoproteinemia; Hypothyroidism; Diabetogenic Hypoglycemia; Subclinical Hypoadrenocorticism; Hypochlorhydria; Pancreatic Insufficiency; Anemia; Subclinical Infection (chronic); Hypertension; Postural Hypotension; Rheumatoid Arthritis; Arteriosclerosis; Hypertrophic Arthritis; Calcinosi; Hypogonadism."

Robert B. Vance treated said patient through March 11, 1974, for some or all of the foregoing stated conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from any or all of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and dysfunctions. Robert B. Vance's con-

duct therein amounts to gross incompetency in the practice of osteopathy and his use of chelation therapy for the treatment of arteriosclerosis is medically unsound, is contrary to safe medical procedures and can cause serious damage to the health of a patient or even can produce death.

U. Robert B. Vance on October 3, 1973, undertook treatment of a patient by the name of Lois T. Thorsted on the basis of his following diagnosis: "Reactive Hypoglycemia; Subclinical Hypoadrenocorticism; Hypokalemia; Hypoproteinemia; Hypothyroidism; Hypertriglyceridemia; Hyperuricemia; Hypogonadism; Hypertension; Arteriosclerosis; Subclinical Infection; A mixed vitamin-mineral-endocrine Dyscrasia."

Robert B. Vance treated said patient through to December 11, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

V. Robert B. Vance on August 6, 1973, undertook treatment of a patient by the name of Breta McBride on the basis of his following diagnosis: "Hypoproteinemia; Hypothyroidism; Diabetogenic Hypoglycemia; Subclinical Hypoadrenocorticism; Multiple Mineral Deficiencies and Imbalances; Hypoestrinism; Cerebral Arteriosclerosis.

Robert B. Vance treated said patient through to September 27, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was

treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

W. Robert B. Vance on May 23, 1970, undertook treatment of a patient by the name of Helmuth A. Moeller on the basis of his following diagnosis: "Pre-Diabetes Mellitus, Reactive Hypoglycemia, Subclinical Hypoadrenocorticism."

Vance treated said patient through to March 14, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

X. Robert B. Vance on October 18, 1972, undertook treatment of a patient by the name of Renee R. Mayer on the basis of his following diagnosis: "Hypoproteinemia; Hypothyroidism; Multiple Mineral Deficiencies; Reactive Hypoglycemia; Subclinical Hypoadrenocorticism; Hypochlorhydria; Aenmia; Hypogonadism."

Robert B. Vance treated said patient through to October 8, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

Y. Robert B. Vance on September 26, 1973, undertook

treatment of a patient by the name of Joseph M. Kirton on the basis of his following diagnosis: "Multiple Mineral Deficiencies and Imbalances; Hypochlorhydria; Hypertriglycerin; Diabetes Mellitus; Reactive Hypoglycemia; Subclinical Hypoadrenocorticism; Hyperuricemia; Chronic Rhinitis Infection."

Robert B. Vance treated said patient through to October 20, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct amounts to gross incompetency in the practice of osteopathy.

Z. Robert B. Vance on October 8, 1973, undertook treatment of a patient by the name of Sherrie Hundley on the basis of his following diagnosis: "Pre-Diabetes Mellitus; Carbohydrate Intolerance; Reactive Hypoglycemia."

Robert B. Vance treated said patient through to December 12, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

A.A. Robert B. Vance on September 4, 1973, undertook treatment of a patient by the name of Mabel E. Hardman on the basis of his following diagnosis: "Hypoproteinemia; Hypothyroidism; Diabetogenic Hypoglycemia; Reactive Hypoglycemia; Subclinical Hypoadrenocorticism; Hypochlorhydria; Hypo-estrinism; Arteriosclerosis; Hyperten-

sion; Somatic Dysfunction of the lumbosacral spine; Hypertrophic Arthritis."

Robert B. Vance treated said patient through to November 21, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

BB. Robert B. Vance on March 21, 1972, undertook treatment of a patient by the name of Jerda Felt on the basis of his following diagnosis: "Relative hypoglycemia; secondary to chronic subclinical adrenal cortex hypofunction."

Robert B. Vance treated said patient through to September 28, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

CC. Robert B. Vance on May 8, 1973, undertook treatment of a patient by the name of Gwenyth J. Thorne on the basis of his following diagnosis: "Hypoproteinemia; Hypothyroidism; Multiple Mineral Deficiencies and Imbalances; Diabetogenic Hypoglycemia; Reactive Hypoglycemia; Subclinical Hypoadrenocorticism; Hypochlorhydria.

Robert B. Vance treated said patient through to September 28, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not in-

dicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy. In addition to the foregoing, Robert B. Vance did use a procedure called "chelation therapy" on said patient for the treatment of arteriosclerosis, a treatment which for such condition, if it did in fact exist, was not a safe and proper medical procedure and the use of such treatment could be harmful to a patient and even produce death.

DD. Robert B. Vance on September 11, 1973, undertook treatment of a patient by the name of Jack Daniels on the basis of his following diagnosis: "Hypoproteinemia; Hypothyroidism; Hypochlorhydria; Subclinical Hypoadrenocorticism; Diabetogenic Hypoglycemia; Hyperadrenocorticism; Diabetogenic Hypoglycemia; Hypercholesterolemia; Sciatic Neuritis and Neuralgia."

Robert B. Vance treated said patient through to December 18, 1973, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

EE. Robert B. Vance on October 25, 1969, undertook treatment of a patient by the name of Carole Parry on the basis of his following diagnosis: "Reactive Hypoglycemia; Subclinical Hypoadrenocorticism; Hypokalemia; Hypoproteinemia; Hypothyroidism; Hypertriglyceridemia; Hypo-

gonadism; Hypertension; Arteriosclerosis; Subclinical Infection; A mixed vitamin-mineral-endocrine Dyscrasia."

Robert B. Vance treated said patient through to January of 1970 for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

F.F. Robert B. Vance undertook to treat a patient by the name of Laurie Nielson on or about September 10th, 1979, for a lower back injury suffered while practicing gymnastics; that Robert B. Vance did give said patient a number of injections called prolotherapy which injected solution contained Xylocane and phenol to deaden pain, that such treatment is not a recognized medical procedure and since phenol is a toxic substance it could cause damage or death to the patient.

GG. Robert B. Vance on March 27, 1980, undertook treatment of a patient by the name of Elleen Waters, aka Eileen Seifert on the basis of his following diagnosis: "Reactive Hypoglycemia (secondary to chronic subclinical adrenocortical hypofunction); pre-diabetes mellitus."

Robert B. Vance treated said patient through to May 6, 1980, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems, maladies and body dysfunctions. His conduct therein

amounts to gross incompetency in the practice of osteopathy.

HH. Robert B. Vance on April 2, 1980, undertook treatment of a patient by the name of Jan Stevens on the basis of his following diagnosis: "Reactive Hypoglycemia; Sub-clinical Hypoadrenocorticism; Hypoproteinemia; multiple mineral deficiencies and imbalances; chronic acne trugaris and reaction syndrome food."

Robert B. Vance treated said patient through to May 21, 1980, for some or all of the foregoing conditions. The laboratory tests and clinical examinations did not indicate said patient was suffering from all or any of said diagnosed conditions and he knew or should have known he was treating and charging for treatment of non-existent health problems and body dysfunctions. His conduct therein amounts to gross incompetency in the practice of osteopathy.

II. Robert B. Vance on December 31, 1978, did consult by telephone with Betty Nickeson of Casper, Wyoming. He was informed that James W. Nickeson, her son, was suffering from Ewings Sarcoma, a type of terminal bone cancer. Robert B. Vance assured Betty Nickeson that much could be done for her son and that if she could get James Nickeson to Salt Lake City, he, Robert B. Vance, could save him. On January 5, 1979, James Nickeson was carried in on a stretcher into the office of Robert B. Vance where he was immediately administered an I.V. injection containing vitamins and laetrile. No examination was given or tests of any kind were taken prior to the I.V. injection. Robert B. Vance then instructed Mr. and Mrs. Nickeson to take their son, James W. Nickeson, to a motel where he would send his practical nurse "Kathy" each day to administer the I.V. injections and that this nurse would instruct the parents as to the items needed for the I.V. medication. A sample

was taken of the patient's urine to be sent to Bio Med Research Lab., Seattle, Washington 98122 (for which Mr. and Mrs. Nickeson paid Robert B. Vance the sum of \$75.00) from which a serum was to be made for James W. Nickeson's treatment. In addition to the urine test mentioned above, Robert B. Vance took a blood sample of James W. Nickeson, charging \$240.00 at that time, for an ISO-E Chemistry Lab., Inc., Bio-chemistry biopsy, the results of which Robert B. Vance stated would tell him everything. Although Mr. and Mrs. Nickeson have repeatedly requested copies of the results of said tests and the "serum" they have received no response from Robert B. Vance.

During the entire time from the day when James W. Nickeson was carried out of the office of Robert B. Vance on January 5, 1979, to the motel where he stayed for ten days, until January 16, 1979, not once did Robert B. Vance attend said patient, leaving all such matters in the hands of his assistant "Kathy" who daily administered the I.V. solution, a total of 73 pills per day and 4 enemas per day. The I.V.'s consisted of 1/2 bottle of glucose, some vitamin C and liquid laetrile, for which a charge was made and received by Robert B. Vance of \$100.00 for each such I.V. administered by his nurse at the motel.

On January 16, 1979, James W. Nickeson was flown back to Casper, Wyoming where he died on January 26, 1979.

On the representations of Robert B. Vance that he could save her son if the parents could get him to Salt Lake City, Betty Nickeson expended the sum of over \$3,000.00 and as a result of the treatments of Robert B. Vance said James W. Nickeson suffered greatly from the administration of the I.V.'s, the enemas and the pills.

Robert B. Vance in making any representations that the cancer from which James W. Nickeson was suffering could

be cured was in violation of §58-12-36(5) U.C.A. 1953, as amended and is unprofessional conduct.

J.J. That it is the opinion of your petitioner that other records of Robert B. Vance would indicate a course of action where many more patients have been diagnosed improperly and incorrectly as suffering from a condition known as hypoglycemia and/or a condition known as arteriosclerosis and as a result of such improper diagnosis the patients have been treated for non-existent diseases, maladies or physical dysfunctions and been given treatments not recognized or accepted as proper and appropriate within the medical profession.

KK. All of the foregoing alleged acts of unprofessional, taken as a whole, is conclusively indicative of a course of conduct and method of practice as an osteopath which violates the principles of sound medical practice and is "conduct or practice, contrary to the recognized standards of ethics of the medical profession," and is, furthermore, "conduct or practice which does or might constitute a danger to the health, welfare or safety of the patient or the public," and is unprofessional conduct as provided in §58-12-36(15) U.C.A. 1953, as amended.

8. That each of the foregoing allegations in the above paragraph constitutes unprofessional conduct as is defined by the above cited statute and is grounds for disciplinary action pursuant to §58-1-25 and 58-12-36, Utah Code Annotated 1953, as amended, as hereinbefore cited.

WHEREFORE, your petitioner prays that Robert B. Vance be required to appear before the Department of Registration on an Order to Show Cause and at such hearing show cause, if any he has, why his license to practice in the State of Utah as an osteopathic physician and surgeon

should not be suspended or revoked for unprofessional conduct as that term is defined by law.

DATED this 30th day of September, 1980.

---

L. B. BOULTER,  
Investigator

**APPENDIX "B"****FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**ROBERT B. VANCE vs. PAUL T. FORDHAM,**  
Director of the Department of Registration, et al.

**Appearances:**

Leon A. Halgren for the Division of Registration.  
Robert McRae, Attorney for Respondent.

Pursuant to notice duly served by certified mail, this matter came on regularly for hearing on the 5th, 6th, 7th, 8th, and 9th day of January, 1981 and also on the 2nd day of February, 1981 before the Osteopathic Committee of the State of Utah and the Division of Registration. Evidence was offered and received, and the Osteopathic Committee, having been advised in the premises, now makes and enters to the Director of the Division of Registration the following Findings of Fact, Conclusions of Law and its Recommended Order based thereon:

**FINDINGS OF FACT**

1. We find that osteopathic physicians and surgeons should maintain and uphold the same standards of care as medical doctors in caring for and treating their patients. When a physician assumes primary care of a patient by advising a patient to discontinue medications or instructions from a previous physician, the new physician should do a complete physical examination and record such. The physical examination should include at least examination of the heart, lungs and abdomen. No intravenous solutions should be given without a physical examination (including heart and lungs) being performed. We also find that a phy-

sician must be in attendance when intravenous solutions are given unless it is an emergency. We find that Robert B. Vance did not abide by and follow these standards in his treatment of patients and in particular in his care and treatment of James Nickeson.

2. We have had testimony that preventative medicine as practiced by Dr. Vance and his colleagues should be practiced in addition to the basic (orthodox) standards of medicine in the United States. We find that Dr. Vance has not maintained these basic standards in his practice.

3. Inasmuch as Chelation Therapy is not accepted among medical standards as a proper method of treatment for atherosclerosis in the United States, it should not be prescribed as such by a physician in general practice.

4. We find that Laetrile (Amygdalin, D-17) should not be prescribed in lieu of standard accepted medical treatment for a patient suffering from cancer.

5. We find that Robert B. Vance diagnosed hypoglycemia too often without adequately ruling out other diseases or body dysfunctions.

6. We find that in many cases Dr. Vance led many patients into believing that his form of therapy was more beneficial than treatment which is recognized as proper or appropriate in the medical profession.

7. Dr. Vance's use of kinesiology (having a patient hold arm out, doctor placing his hand on top and thinking of various foods, with the resulting dropping of the arm determining food allergies) as the sole test to determine food allergies is totally unfounded.

8. As to the allegations in the petition (referring to paragraphs of the petition) we make specific findings as to each such allegation as follows:

A. We find the allegations to be true in that Robert B. Vance provided unnecessary and unproven medical treatment of atherosclerosis by giving Chelation therapy.

B. No finding.

C. No finding.

D. No finding.

E. We find the allegation to be true and substantially supported by the evidence.

F. No finding.

G. We find the allegations to be true in that the evidence showed that Robert B. Vance did not do a physical examination; he used iridology, an unaccepted and unproven method of diagnosis, and diagnosed hypothyroidism from a low axillary temperature with disregard for normal laboratory tests.

H. We find the allegations to be true. He charged for a cronogram (kirlian photography) which he testified he was doing for research purposes, without notifying the patient of such fact and admitted its use as a diagnostic tool was of questionable value.

I. We find the allegations to be substantially supported by the evidence.

J. No finding.

K. No finding.

L. No finding.

M. No finding.

N. No finding.

O. No finding.

P. No finding.

Q. No finding.

R. No finding.

R. We find the allegations to be substantially supported by the evidence.

S. No finding.

T. No finding.

U. No finding.

V. No finding.

W. No finding.

X. No finding.

Y. No finding.

Z. No finding.

AA. No finding.

BB. No finding.

CC. No finding.

DD. No finding.

EE. No finding.

FF. No finding.

GG. No finding.

HH. We find the allegations to be substantially supported by the evidence.

II. We find the allegations to be truly and fully supported by the evidence. In the Nickeson case there was evidence of gross negligence on the part of Dr. Vance. He should not have encouraged the family to have the patient leave the Casper, Wyoming Hospital; the diagnostic process had not been completed. He instituted intravenous therapy in his office before doing a physical examination; in fact, he never did do a physical examination. The patient was treated with questionable therapy in lieu of standard

medical treatment. Dr. Vance did not see the patient in excess of five days while treating the patient, not under the direct control of Robert B. Vance, was receiving daily I.V. therapy. He discontinued the coumadin therapy without examining the patient's leg for thrombophlebitis or monitoring clotting times. Mrs. Nickeson, the patient's mother, purchased oral Laetrile (Amygdalin, B-17) in Dr. Vance's office from Margaret Smith. We feel that he is responsible for anything that takes place in his office. In general, this case was beyond the expertise of a general practitioner.

In spite of the fact that he has gained a great deal of knowledge in the field of preventative medicine, assuming primary care for a patient such as Mr. Nickeson was beyond the scope of his additional knowledge.

### **CONCLUSIONS OF LAW**

On the basis of the Findings of Fact the Osteopathic Committee concludes that the Respondent, Robert B. Vance is subject to the provisions of §58-12-36(15) Utah Code Annotated 1953, as amended and that he has committed acts of sufficient severity amounting to unprofessional conduct as set forth in said §58-12-36(15) on which to base disciplinary action for revocation of his license to practice as an Osteopathic Physician and Surgeon in the State of Utah as hereinafter provided.

**RECOMMENDED ORDER**

The Osteopathic Committee of the State of Utah recommends to the Director of the Division of Registration that the license of the Respondent, Robert B. Vance, as an Osteopathic Physician and Surgeon in the State of Utah be revoked.

DATED this 2nd day of February, 1981.

---

KATHRYN GREENWOOD  
LELAND SHAPPER  
KAIGO HASE

**APPENDIX "C"**

**STATE OF UTAH**  
**BEFORE THE DEPARTMENT OF REGISTRATION**  
Case No. 80-27  
C81-1149

In the Matter of the License to Practice as an Osteopathic

Physician and Surgeon of Robert B. Vance, D.O.

The foregoing recommended Findings of Fact, Conclusions of Law and Recommended Order are hereby adopted by the Director of the Division of Registration of the State of Utah.

In accordance with the Recommended Order, Robert B. Vance's license to practice as an Osteopathic Physician and Surgeon and prescribe Controlled Substances is hereby revoked; and Respondent shall immediately surrender said license cards and certificate to the Division of Registration effective on the date of receipt of this Order.

Dated this 6th day of February, 1981.

---

PAUL T. FORDHAM  
Director

**APPENDIX "D"****NOTICE OF APPEAL**

**ROBERT B. VANCE vs. PAUL T. FORDHAM,**  
Director of the Department of Registration, et al.

Appellant, through counsel, and pursuant to §58-12-35.1 (15) does hereby appeal the Order of Paul T. Fordham, Director, Utah State Department of Registration, under date of February 6, 1981, revoking appellant's license to practice as an Osteopathic Physician and Surgeon in this State, for the reason that the Director and the Osteopathic Committee acted capriciously, arbitrarily and outside the scope of their authority, that the Findings are wholly unsupported by the facts and the law, and for the further reasons as set forth in appellant's Memorandum to be submitted within 30 days from the date hereof.

Appellant petitions this Court to reverse the Order below and to issue an Order temporarily reinstating the said license to practice until the Court has had an opportunity to fully review the record of the proceedings before the hearing board and render its final Order.

DATED this 9th day of February, 1981.

---

LONI F. DELAND  
McRAE & DELAND  
Attorney for Appellant

**APPENDIX "E"****MEMORANDUM OPINION ON MOTIONS  
TO DISMISS**

**ROBERT B. VANCE vs. PAUL T. FORDHAM,**  
Director of the Department of Registration, et al.

Appellant's Motion to Dismiss is denied for the following reasons :

1. Dr. Greenwood, although not qualified to be appointed to the Department of Registration's Osteopathic Committee, was a de facto officer who acted under color of law and authority; there was no absence of jurisdiction in the committee.

2. The requisite majority of the Committee, without Dr. Greenwood's vote, recommended action to the Department.

3. Even if the decision of the Committee were voidable by reason of Dr. Greenwood's lack of qualifications to sit thereon, it could be voided only at the instance of an aggrieved party who has made a timely protest. Appellant raises the point for the first time on appeal, and his objection is untimely.

DATED this 19th day of October, 1981.

---

**CHRISTINE M. DURHAM**  
District Judge

**APPENDIX "F"****JUDGMENT AND ORDER**

**ROBERT B. VANCE VS. PAUL T. FORDHAM,**  
Director of the Department of Registration, et al.

The above entitled matter came on regularly before the court on appeal from the Department of Business Regulation, Division of Registration. The appellant was represented by M. Richard Walker and Kirkpatrick W. Dilling, and the respondents were represented by Stephen G. Schwendiman and Leon A. Halgren, Assistant Utah Attorneys General, and the court having been supplied briefs by both counsel relative to the merits of the appeal, and the court having reviewed said briefs, transcript, and evidence of the administrative hearing, and the court having taken the matter under advisement entered its Memorandum Opinion on Appeal, and based on said Opinion hereby **ORDERS, ADJUDGES AND DECREES:**

1. The Order of the Court staying the implementation of the Department's Order of Revocation pending the outcome of the appeal in this court is hereby dissolved.

2. The Order of Paul T. Fordham, Director, Division of Registration dated February 6, 1981, revoking the license of Robert B. Vance to practice as an Osteopathic Physician and Surgeon and to prescribe controlled substances, is hereby affirmed.

DATED this 15th day of December, 1981.

---

**CHRISTINE M. DURHAM**  
District Judge

## MEMORANDUM OPINION ON APPEAL

Appellant has petitioned this court pursuant to §58-12-35.1(5) Utah Code Annotated for reversal of the Order of the Director of the Utah State Department of Registration revoking his license to practice as an Osteopathic Physician and Surgeon in this state. The appeal is based on the contention that the Director, and the Osteopathic Committee on whose findings and recommendation the Director relied, acted "capriciously, arbitrarily, and that the Findings are wholly unsupported by the facts and the law."

Nothing in Plaintiff's Memorandum on Appeal or in the record demonstrates any excursion by the Committee or the Director beyond the scope of their statutory authority and appellant's Motion to Dismiss Appeal because of Dr. Greenwood's residency period has already been submitted to this Court and denied. Therefore, this opinion will not address that question beyond reference to the previous decision that it is without merit.

It should be noted that the transcript of the hearing before the Osteopathic Committee consists of six volumes, numbering 1189 pages. The Court has read the entire transcript, and examined all of the Exhibits described in Respondents' Filing of Record of Board Hearing, together with the extensive Memoranda filed by counsel for the parties.

The standard of appellate review of administrative decisions is set forth in *Petty v. Utah State Board of Regents*, 595 P. 2d 1299 (1979), cited by Respondents as follows:

. . . an administrative agency should be allowed a comparatively wide latitude of discretion in performing its responsibilities; and . . . the court should not intrude or interfere therewith unless the action is so

oppressive or unreasonable that it must be deemed capricious and arbitrary, or that an agency has in some way acted contrary to law or in the excess of its authority.

Appellant emphasizes that his livelihood is at stake and that due process standards must be complied with. He suggests that the use of hearsay evidence deprived him of that protection, but entirely fails to identify any finding of the Osteopathic Committee which was based solely on uncorroborated hearsay evidence. A comparison between the general and specific findings of the Committee and the record demonstrates that each finding is supported by non-hearsay evidence. While it is true that some of the testimony was in conflict, Dr. Vance denying some of the allegations made by former patients, there is an evidentiary basis for the committee's findings, and no basis for a claim of denial of due process. The Committee was at liberty to make its own judgments on credibility.

The comparison referred to above between the voluminous record and the findings of the Committee further demonstrates the following:

1. Dr. Vance was offered a full opportunity to be heard, to cross-examine adverse witnesses, and to call witnesses on his own behalf.

2. The Committee was unusually cautious in its findings; on the specific allegations in paragraph 8 of the Petition, for example, the Committee made "no findings" on 27 out of 34, apparently not finding there to be sufficient evidence upon which to base any findings. The remaining seven findings in paragraph 8 adverse to appellant are each amply and thoroughly supported by testimony and other evidence in the record. Likewise, the findings numbered 1 through 7 are based upon testimony in the record,

and upon the professional expertise of the members of the Committee. This Court may not substitute its judgment on factual matters for that of the fact-finding body unless that body has clearly acted capriciously or arbitrarily, or unless its conclusions are unsupported by the evidence. Neither circumstance exists here. The record suggests that the Committee was conservative in its findings rather than otherwise, and those findings entirely support the recommended Order entered by the Director. That Order is hereby affirmed.

DATED this 3rd day of December, 1981.

---

CHRISTINE M. DURHAM,  
District Judge

**APPENDIX "G"**

**NOTICE OF APPEAL**

**ROBERT B. VANCE vs. PAUL T. FORDHAM,**  
Director of the Department of Registration, et al.

**TO THE ABOVE NAMED DEFENDANTS AND THEIR  
ATTORNEY, STEVEN G. SCHWENDIMAN**

COMES NOW the Plaintiff hereto and hereby appeal that certain Judgment and Order filed in the above entitled matter on the 16th day of December, 1981, to the UTAH SUPREME COURT, pursuant to the provisions of Rule 73 of the Utah Rules of Civil Procedure; and, pursuant thereto, herewith file their Bond of Appeal.

DATED this 18th day of December, 1981.

---

**M. RICHARD WALKER**  
Attorney for  
Appellant/Plaintiff

## APPENDIX "H"

## IN THE SUPREME COURT OF THE STATE OF UTAH

August 22, 1983

ROBERT B. VANCE vs. PAUL T. FORDHAM,  
Director of the Department of Registration, et al.

*OAKS, Justice:*

Appellant, an osteopathic physician, had his license revoked by respondent, Director of the Department of Registration. The revocation was for "unprofessional conduct" pursuant to a recommendation of the Department's Osteopathic Committee after the notice and hearing specified in U.C.A., 1953, §§58-1-25 to -33. The district court sustained the administrative action.

On this appeal from the district court, appellant challenges the sufficiency of the evidence for the administrative finding and the legality of a revocation for "unprofessional conduct" when the Department has not published regulations defining what professional conduct is forbidden under that standard. Appellant also challenges the statutory qualifications of one of the three members of the osteopathic committee who recommended the revocation, contending that this deficiency ousted the committee of its jurisdiction and deprived him of his license without due process of law.

Appellant graduated from the Kirksville (Mo.) College of Osteopathic Medicine in 1958. During the next several years, he completed an internship at an osteopathic hospital in Michigan, obtained other postgraduate experience in several different states, and acquired licenses to practice his profession in Indiana, Michigan, Missouri, and Ohio. Since 1961, he has been licensed and has practiced his pro-

fession in Utah. Apart from these uncontested facts, the parties characterize appellant in sharply different terms.

Appellant's brief represents appellant as a distinguished professional who has dedicated hundreds of hours to research and study with many of the leading practitioners and pioneers in the field of medicine, averaging eight to ten medical conventions and seminars each year to advance his knowledge in order to assist suffering patients. He is nationally recognized in the field of preventive medicine and has been certified by the American Academy of Medical Preventives as a Diplomate in chelation therapy.<sup>1</sup> He has treated some 8,000 persons over the past decade, only 35 of whom were selected as the subject matter of the petition filed against him, and only 8 of these were the subject of adverse findings by the Department.

In respondent's brief, appellant is characterized as one who utilized methods and mechanisms totally foreign to the practice of medical doctors or osteopaths and whose diagnostic abilities are founded upon questionable theory rather than scientific knowledge. Respondent relies on the findings of the Department and its Osteopathic Committee that appellant did not maintain the "basic (orthodox) standards of medicine" in his practice. Specifically, he did not do a complete physical examination before giving intravenous solutions or before assuming primary care of patients by advising them to discontinue medications or instructions given them by their previous physicians, and he prescribed chelation therapy (an "unnecessary and unproven medical treatment for atherosclerosis") and laetrile (which "should not be prescribed in lieu of standard accepted medical treat-

---

<sup>1</sup> Chelation therapy involves the intravenous administration of a chemical solution to relieve poor circulation caused by hardening of the arteries.

ment for a patient suffering from cancer"). Respondent also cites the findings that appellant used the "totally unfounded" method of kinesiology "as the sole test to determine food allergies," that he employed Kirlian photography for research purposes without notifying the patient that its use as a diagnostic tool was of questionable value, and that he was grossly negligent in assuming the primary care of and in treating a gravely ill patient whose condition was beyond the scope of appellant's knowledge in the field of preventive medicine.

It is not the function of this Court to pass judgment on the professional qualifications or practices of appellant, or even to resolve the conflicts between his supporters and his detractors. Our function is limited to assuring the legality of and compliance with the process the law has established to regulate the professions in the public interest. *State v. Hoffman, Utah*, 558 P 2d 602 (1976); *Baker v. Department of Registration*, 78 Utah 424, 442-45, 3 P 2d 1082, 1090-91 (1931).

## I. THE PROCEEDINGS BELOW

Several of appellant's allegations of error turn on whether the proceedings in the district court were in the nature of an appeal under §58-12-35.1 or an original action under §58-1-36. We begin with that determination.

On September 30, 1980, an investigator for the Department of Registration signed a 16 page petition making detailed allegations of thirty-seven instances of unprofessional conduct by appellant in the treatment of various patients. During six days in January and on February 1, 1981, the Department held a hearing on these allegations before an administrative law judge and the three-member Osteopathic Committee. This Committee, appointed by the Director of

the Department of Registration with the approval of the Governor, performs statutory functions in examining and licensing and in reviewing the professional conduct (including revoking licenses) of members of the osteopathic profession. §§58-1-5 to -36.

Thirty five witnesses testified at the hearings, including appellant, seven M.D.s, two D.O.s (one of whom was also an M.D.), and twenty-five other witnesses. Most of the other witnesses were patients of appellant. Most of the M.D.s testified on the care of particular patients. On the subject of medical standards generally, one D.O. from Utah testified against appellant and three M.D.s (one of whom was also a D.O.) from California testified for him.

On February 2, 1981, the Osteopathic Committee found unprofessional conduct under seven of the allegations and recommended that appellant's license be revoked. On February 6, 1981, respondent, as Director of the Department, approved the Committee's recommended findings and conclusions and revoked appellant's license, effective immediately. On February 10, 1981, appellant's counsel, who had represented him at the hearing, filed an "appeal" to the district court "[p]ursuant to §58-12-35.1(5)." Appellant has been permitted to continue his practice during the pendency of his appeals under a succession of stays issued by the district court and by this Court. In the summer of 1981, appellant's original counsel withdrew and was replaced by his present counsel.

On October 2, 1981, appellant moved to dismiss the order of revocation and the appeal and to reinstate appellant's license on the basis that one of the three members of the Osteopathic Committee, Dr. Katherine Greenwood, had been licensed in the state of Utah since June 6, 1978, a period of less than three years at the time of her appointment on

January 5, 1981, whereas §58-1-6 clearly requires at least five years.<sup>3</sup> After briefing and argument, at which appellant's counsel stated that this deficiency had just been discovered in mid-September, the District Court denied the motion on October 19, 1981. The Court's memorandum opinion gave three reasons:

1. Although not qualified for appointment to the Osteopathic Committee, Dr. Greenwood was a de facto officer, who acted under color of law and authority, so there was no absence of jurisdiction in the committee.
2. The revocation had been recommended by the requisite majority of the committee without Dr. Greenwood's vote.
3. Even if the decision of the committee were voidable by reason of Dr. Greenwood's lack of qualifications, that decision could only be voided at the instance of an aggrieved party who made a timely protest, and appellant's protest, made for the first time on appeal, was untimely.

We review that decision in Part IV of this opinion.

Both parties then filed lengthy memoranda arguing their respective positions on the basis of the transcript of the

---

<sup>3</sup> Section 58-1-6, as then in effect, provided in pertinent part:

Each member of a committee, except members selected from the public at large, must have had a license to practice in this state in the particular field from which selected for a period of five years immediately prior to his appointment and be in good standing in the profession, trade or occupation from which appointed.

Law of Feb. 22, 1979, ch. 19, §2, 1979 Utah Laws 258, 261 (amended 1981). The five-year requirement has since been omitted effective May 12, 1981. Law of March 12, 1981, ch. 34, § 3, 1981 Utah Laws 254, 255.

hearings before the committee, which had been filed in the district court. Neither party sought to introduce any other evidence. The memoranda of both parties referred to the proceeding in the district court as "an appeal." Both reviewed the evidence and argued the issue in terms of whether or not the Department's findings were "arbitrary or capricious."

On December 3, 1981, the district court affirmed the department's order. The court's memorandum opinion refers to the proceeding as an "appeal" under §58-12-35.1(5) and applies the arbitrary and capricious standard of review specified in that section and in this Court's decisions on judicial review of administrative decisions, citing *Petty v. Utah State Board of Regents*, Utah, 595 P 2d 1299, 1302 (1979). On the question of the evidentiary support for the findings of the Department, the opinion states that the court had read the entire 1189-page transcript and had examined all of the exhibits and memoranda of counsel. The court concluded that the findings of the Department on the seven instances of unprofessional conduct were "amply and thoroughly supported by testimony and other evidence in the record" and that the other findings (relating to more general matters, such as an osteopathic physician's required standard of care of his patients and the finding that chelation therapy and laetrile were not standard accepted medical treatments) were "based upon testimony in the record, and upon the professional expertise of the members of the Committee." The court concluded:

This court may not substitute its judgment on factual matters for that of the fact-finding body unless that body has clearly acted capriciously or arbitrarily, or unless its conclusions are unsupported by the evidence. Neither circumstance exists here.

## II. SUFFICIENCY OF EVIDENCE

In this court, appellant contends that the proceeding in the district court was not a §58-12-35.1 "appeal" from a decision on medical licensure, but was in the nature of an original action under §58-1-36, the general section governing appeals from administrative actions on licensing revocations. Consequently, appellant urges, the district Court should have reviewed the administrative findings to assure that they were supported by a "clear preponderance of the evidence," *Withers v. Golding*, 100 Utah 179, 111 P 2d 550 (1941), rather than the less comprehensive review under the "arbitrary and capricious" standard actually employed. From this premise, appellant concludes that the court erred in approving the Department's findings which, he says, are not supported by a preponderance of the evidence.

Appellant's premise is faulty. From the notice of appeal filed by appellant through the memorandum opinion of the district court, the proceeding in the district court was never treated as anything other than an appeal on the administrative record under §58-12-35.1. It is true that appellant's counsel advised the district court that he considered the proceeding an original action under §58-1-36 and *Withers v. Golding, supra*, but that advice was first given on December 17, 1981, (at a hearing on appellant's motion for a stay), after the district court had affirmed the revocation.

We are satisfied that the proceeding in the district court was appropriately conducted as an appeal and that the court applied the correct standard of review to the Department's findings. We also hold, despite appellant's strenuous arguments to the contrary, that in ruling on this appeal the district court properly concluded, on the basis of the record evidence, that the Department's findings were not arbitrary and capricious. Those findings were supported by evidence

of substance. In addition, as elaborated hereafter, we conclude that the Department's decision on the intermediate issue of the meaning of "unprofessional conduct" was within the limits of reasonableness. *Utah Department of Administrative Services v. Public Service Commission*, Utah, 658 P 2d 601, 609-12 (1983).

### III. FAILURE TO ELABORATE "UNPROFESSIONAL CONDUCT"

Appellant next argues that the Department cannot suspend his license for "unprofessional conduct" when the Osteopathic Committee had not previously defined unprofessional conduct and published rules and regulations for the protection of the public as was its statutory duty. §58-1-13(6), (7). He relies on *Tuma v. Board of Nursing*, 100 Ariz. 74, 593 P 2d 711 (1979), and *Megdal v. Oregon State Board of Dental Examiners*, 288 Or. 293, 605 P 2d 273 (1980), which upset license revocations because there were no elaborating regulations to put the professional on notice of what practices were proscribed as "unprofessional conduct."

Respondent counters by citing *Chatek v Anderson*, 83 Ill. 2d 502, 416 N.E. 2d 247 (1981), which held that a dentist's license could be revoked for "unprofessional conduct" proven by instances of negligence in the care of his patients. *Chastek* cites a host of cases sustaining that statutory standard against challenges based on violations of due process because of lack of notice or vagueness. Thus, even *Megdal*, relied on by appellant, held that there was no constitutional violation in the use of this standard, since objections of vagueness that apply to penal laws do not apply to the revocation of professional licenses. *Megdal*, 288 Or. at 296-303, 316, 605 P 2d at 274-78, 285.

As noted in *Chastek*, both *Tuma* and *Megdal* involved acts not associated with the professional's treatment of his pa-

tients. 83 III. 2d at 505-07, 416 N.E. 2d at 249. *Tuma* involved a nurse's interference in the doctor-patient relationship, and *Megdal* involved a dentist's insurance fraud. In the context of the statutes and hearing procedures in those cases, the courts held that "unprofessional conduct" could not be used to revoke licenses without prior rules establishing the standards by which the professionals would be judged. Neither case denied (in fact both apparently conceded) that the standard of "unprofessional conduct" could be applied by expert professionals to judge another professional's conduct in the care of patients. This was the holding in *Chastek*.

*Athay v. State Department of Business Regulation*, Utah, 626 P 2d 965 (1981), is not to the contrary. There, the Department refused to permit an applicant to sit for the examination necessary for certification as a psychologist on the basis that her doctor's degree did not meet the statutory requirement of "a program of studies whose content was primarily psychological." §58-25-2(2). In reversing that action, this Court held that Department's failure to establish guidelines for a curriculum or a criteria for course content which is 'primarily psychological' constituted arbitrary action and deprived plaintiff of her rights of due process of law." 626 P 2d at 968. The Court required "uniform, published, identifiable and objective standards," *id* at 966, in apparent recognition that prospective professionals who are making large investments of time and money are entitled to specific guidance as to what is necessary for professional certification.

Once a professional is certified, however, the public's interest in his or her professional performance in the treatment of patients (or in services to clients) is paramount. It is therefore appropriate for the public to place great reliance on the self-governing functions and standards of

the profession. As applied to the treatment of patients (or services to clients), a general statutory standard like "unprofessional conduct" is acceptable for three reasons: (1) The subject of professional performance is too comprehensive to be codified in detail. (2) Members of a profession can properly be held to understand its standards of performance. (3) Standards of performance will be interpreted by members of the same profession in the process of administrative adjudication. Thus, the public can receive greater protection from a certified professional than from an applicant for certification, because a certified professional can be held to a higher standard of awareness of the profession's uncoded standards in the treatment of patients (or in services to clients) than an applicant.

For the reasons described above, the specific guidelines *Athay* required for certification and *Tuma* and *Megdal* required for other activities are therefore unnecessary to the application of the standard of "unprofessional conduct" to a professional's performance of professional services for patients or clients.

In this case, appellant's peers on the Osteopathic Committee judged his treatment of his patients. Granted, the Committee did not codify or publish standards of conduct for osteopaths in advance of the hearing, but the statutes do not mandate advance publication. Section 58-1-13(6) requires the Committee to "[d]efin[e] unprofessional conduct," but in respect to patient care the Committee may do that on a case-by-case basis by drawing on the statutory standards quoted below and on its own knowledge of the patient-care standards of the profession. *Shea v. Board of Medical Examiners*, 51 Cal. App. 3d 564, 575-76, 146 Cal. Rptr. 653, 659-60 (1978); *Buhr v. Arkansas State Board of Chiropractic Examiners*, 261 Ark. 319, 322, 547 S.W. 2d 762, 764 (1977) (en banc); *In re Mintz*, 233 Or. 441, 378 P 2d

945 (1963); *Reyburn v. Minnesota State Board of Optometry*, 247 Minn. 520, 523-24, 78 N.W. 2d 355 (1956). As for §58-1-13(7), the use of the permissive "may" indicates that the publication of "rules and regulations" is optional with the Committee. The considerations relied on by the dissent may well require the publication of rules or standards for other aspects of professional conduct, as mentioned above, but we are satisfied that this is not mandatory for the performance of professional services for patients or clients.

The petition filed against appellant in this case charged him with "unprofessional conduct" as defined in the Medical Practices Act, §58-12-36(15), which the petition alleged was applicable to a doctor or osteopathy.<sup>3</sup> The petition specifically quoted that statutory definition as follows:

[A]ny conduct or practice, contrary to the recognized standards of ethics of the medical profession, or any conduct or practice which does or might constitute a danger to the health, welfare or safety of the patient or the public.

The hearing before the administrative law judge and the Osteopathic Committee went forward using that definition as the applicable standard, and it was specifically applied in the findings and conclusion of the Osteopathic Committee (approved by the Director).<sup>4</sup> The adequacy and approp-

---

<sup>3</sup> On the facts of this case, we need not determine whether this section of the Medical Practice Act was formally applicable to a doctor of osteopathy at that time. The record is silent on why the parties did not apply or rely on §58-12-18, which the dissent represents as the solely applicable expression of "unprofessional conduct" for osteopaths. There is no doubt that the parties to this controversy could mutually adopt the language of §58-12-36(15) as a suitable expression of the patient-care standard of the osteopathic profession, and the record shows that they did so in this case. Significantly, this same statutory formula was included in the Osteopathic Medicine Licensing Act, effective May 12, 1981, U.C.A., 1953, §58-12-7(15).

riateness of that statutory standard were not challenged in the appeal to the district court, where it was also applied.

For all of the above reasons, we reject appellant's contention that he was denied any legal right by applying to him the standard of "unprofessional conduct" without prior elaboration in published standards, rules, or regulations.

#### IV. QUALIFICATIONS OF THE OSTEOPATHIC COMMITTEE

Appellant contends that Dr. Greenwood's lack of statutory qualification to serve on the Osteopathic Committee (having been licensed less than five years) ousted that Committee of its jurisdiction so its recommendation or revocation of his license deprived him of property without due process of law. As noted earlier, the district court held that this was not a jurisdictional defect and that the Committee's action was valid because Dr. Greenwood was a de facto officer. We agree.

The parties have cited only one Utah case stating the rule that actions of de facto officers will be given effect: *In re Thompson's Estate*, 72 Utah 17, 87, 269 P. 103, 128 (1927) (district judge's de facto authority when sitting with Supreme Court). However, there are hundreds of such cases in other jurisdictions. Reference to a handful of illustrations will suffice.

#### \* FINDINGS OF FACT:

1. We find that osteopathic physicians and surgeons should maintain and uphold the same standards of care as medical doctors in caring for and treating their patients. . . .

#### CONCLUSIONS OF LAW

. . . [Appellant] is subject to the provisions of Section 58-12-36(15) . . . and . . . has committed acts of sufficient severity amounting to unprofessional conduct as set forth in said Section . . . on which to base disciplinary action for revocation of his license to practice as an Osteopathic Physician and Surgeon in the State of Utah . . . .

In a case appealed from the Utah Territory, the United States Supreme Court gave this explanation for its giving effect to the actions of a United States marshal who performed official acts in connection with mortgage foreclosures and was later held to have done so without authority:

An officer *de facto* is not a mere usurper, nor yet within the sanction of law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. [Citations omitted.] Judicial as well as ministerial officers may be in this position. Freeman on Judgments, sect. 148. The acts of such officers are held to be valid because the public good requires it. The principle wrongs no one. A different rule would be a source of serious and lasting evils.

*Hussey v. Smith*, 99 US. 20, 24 (1878). The "landmark" definition of *de facto* officers in the much-quoted case of *State v. Carroll*, 38 Conn. 449, 472 (1871), includes an officer who acted under color of an appointment that was "void because the officer was not eligible."<sup>25</sup>

---

<sup>25</sup> An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised.

Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take the oath, give a bond, or the like.

Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.

*State v. Carroll*, 38 Conn. 449, 471-72 (1871).

The de facto principle has been applied to reject attempts to upset the actions of various official bodies on the basis that the law made one or more of the members ineligible for service. *E.g., In re Bunker Hill Urban Renewal Project 1B*, 61 Cal. 2d 21, 389 P. 2d 538, 37 Cal. Rptr. 74 (redevelopment agency decision), *cert. denied*, 379 U.S. 28, 899 (1964); *People ex rel. Chillicothes Township v. Board of Review*, 19 Ill. 2d 424, 167 N.E. 2d 553 (1960) (board of review for real estate assessments); *Olathe Hospital Foundation, Inc. v. Extendicare, Inc.*, 217 Kan. 546, 539 P. 2d 1 (1975) (appeals panel decision on certificate of need); *Mitchell v. Louisiana State Board of Optometry Examiners*, La. Ct. App., 146 So. 2d 863 (1962) (optometry licensing), *aff'd*, 245 La. 1, 156 So. 2d 457 (1963), *appeal dismissed*, 377 U.S. 128 (1964); *State ex. rel. Marshall v. Keller*, 10 Ohio St. 2d 85, 226 N.E. 2d 743 (1967) (adjudication by state industrial commission); *United States v. Group*, 333 F. Supp. 242 (D. Me. 1971) (draft board), *aff'd*, 459 F. 2d 178 (1st Cir. 1972). We are satisfied that the de facto rule governs the present circumstance, so that the action of the Osteopathic Committee is not rendered invalid or even voidable on appeal because one of its three members did not meet the statutory qualification for length of time licensed.

Appellant relies on 1 Am. Jur. 2d *Administrative Law* §68 (1962), and two cases cited therein, to the effect that participation by one "disqualified" member of an administrative tribunal affects the action of the entire body. This authority states that the decision is *void* "if participation by a disqualified officer is prohibited by statute," and "voidable where only the common-law rule as to disqualification is violated." But a reading of the entire group of sections on "Disqualification" shows that the only defects that invoke this rule are those violating "the requirement of a disinterested and impartial tribunal," *id.* at §63, such as bias,

prejudgment, or personal or pecuniary interest. *Id.* at §64. The stated rule is apparently an exception to the rule of de facto authority, but it is inapplicable here because this case does not involve the kind of claim that invokes it.\*

The judgment of the district court affirming the revocation of appellant's license is affirmed.

WE CONCUR:

---

GORDON R. HALL, Chief Justice

---

RICHARD C. HOWE, Justice

---

JAY E. BANKS, District Judge

*STEWART, Justice: (Dissenting)*

The appellant was charged with "unprofessional conduct" by an osteopathic representative committee and the Department of Registration. At the time the charges were made, osteopaths were subject to U.C.A., 1953, §58-12-18 (repealed in 1981, *see infra*). Section 18 sets out seventeen subparagraphs stating with particularity acts deemed to be "unprofessional." The osteopathic representative committee charged appellant with, and found him guilty of, unprofessional

---

\* Even if appellant had a viable objection that a member of the Committee was unqualified or should be disqualified, that objection had to be raised in timely fashion, at the outset of the hearing, as the district court held. *Bd. of Medical Registration and Examination v. Armington*, 242 Ind. 436, 178 N.E. 2d 741 (1961); *Olathe Hosp. Found., Inc. v. Extendicare, Inc.*, 539 P2d at 13.

conduct under another section not applicable to osteopaths, §58-12-36. That section applies only to medical doctors.<sup>2</sup> See 58-12-31, 58-12-38. (The Legislature subsequently enacted

---

<sup>2</sup> U.C.A., 1953, §58-12-18 (repeated 1981) provided: The words "unprofessional conduct" as relating to the practice of medicine, or any other system of treating human ailments, or the practice of obstetrics, are hereby defined to include:

(1) Procuring, or aiding in or abetting, or offering or attempting to procure or aid in or abet the procuring of, a criminal abortion.

(2) Procuring any fee or recompense on the assurance that a manifestly incurable diseased condition of the mind or body can be permanently cured.

(3) Communicating without the consent of the patient information acquired in treating a patient necessary to enable one to act for such patient.

(4) Advertising, announcing or stating directly, indirectly or in substance, that the holder of any license issued under the rules and regulations of the department of registration, or that any other person, company, or association by whom he is employed, will cure or attempt to cure or will treat any person or persons for lost manhood, sexual weakness or venereal diseases, or will cure or attempt to cure or treat any disorder or any disease of the sexual organs or acting in the service of any person, firm, association or corporation so advertising, announcing or stating any of such things.

(5) Advertising in a way that is intended or has a tendency to deceive the public or to impose upon credulous or ignorant persons, or that may be harmful or injurious to public morals or safety.

(6) Advertising medicine or means whereby the monthly periods of women can be regulated or the menses re-established if suppressed.

(7) Habitual intemperance or excessive use of narcotics.

(8) Lending one's name to be used as a physician or surgeon by another person who is not licensed to practice in this state.

(9) Street advertising or the public peddling or selling of medical or surgical remedies or appliances in person or by proxy.

(10) Prescribing morphine or cocaine or other narcotics, with intent that the same shall be used otherwise than medicinally, or with intent to evade any law in relation to the sale, use or disposition of such drugs.

(11) Prescribing intoxicating liquor to be used as a beverage.

new standards defining unprofessional conduct, not applicable here, to govern osteopaths and medical doctors. Section 7, ch. 27 Laws of Utah 1981, now U.C.A., 1963, §58-12-7 (Supp. 1981) (osteopaths); and Section 8, ch. 30 Laws of Utah 1981, now U.C.A., 1953, §58-12-36 (Supp. 1981) (medical doctors). Because the committee and the Department had no statutory authority to revoke the appellant's license under §58-12-18, and because the committee and the Department had failed to promulgate rules defining unprofessional conduct which could have provided a valid basis for revoking appellant's license, they relied upon §58-12-36, which applies to medical doctors. Contrary to the majority's opinion, I do not believe that the parties can stipulate to adjudicate the case under statutory standards not applicable to osteopaths.

Section 58-1-25 states the grounds upon which a license of any licensee subject to the Department of Registration,

---

(12) Willfully violating the law in regard to the registration of births and deaths and the report of infection diseases.

(13) Diagnosing or treating a case of venereal disease and failing to make report thereof to the health authorities in such form and manner as the state board of health shall direct.

(14) Treating venereally infected individuals and failing to fully inform such persons of the danger of transmitting the disease to others, and failing to advise against marriage by the person who has such disease in a communicable form.

(15) Advertising or professing publicly to treat human ailments under a system or school of treatment or practice other than that for which he holds a license.

(16) Willfully violating the rules and regulations of the department of registration governing examinations.

(17) Using fraud or deceit to secure a license to practice.

<sup>2</sup> The majority relies on the broad standards stated in subsection (15) of §15-12-36 which reads:

Any conduct or practice, contrary to the recognized standards of ethics of the medical profession, or any conduct or practice which does or might constitute a danger to the health, welfare or safety of the patient or the public. . . .

including such diverse groups as barbers, cosmetologists, and physicians, may be refused, suspended, or revoked. One ground for revocation is "unprofessional conduct." However, a charge of unprofessional conduct, like other grounds for revocation under that provision must, as required by the next subsequent section, §58-1-26, be "specific" in writing, verified and filed with the Department.

The governing statutes required that the term "unprofessional conduct" be defined by the promulgation of rules which give a licensee notice of the type of conduct for which his license could be revoked. The "representative committees" and the Department of Registration may not, as I read our statutes, revoke a license solely on a finding made in an ad hoc adjudicatory proceeding that a licensee has been guilty of some violation deemed for the first time to constitute unprofessional conduct.<sup>3</sup> The statutory procedure for license revocation contemplates notice of specific allegations of acts proscribed either by statute or rule.<sup>4</sup>

Section 58-1-13 is not, as a majority opinion seems to imply, a general authorization to revoke a license for anything a representative committee and the Department might deem to be "unprofessional conduct." Rather, that provision simply states that a representative committee may propose

---

<sup>3</sup> Existing, well recognized standards in the profession may provide sufficient normative standards. But once the osteopathic committee decided to condemn conduct beyond that condemned by the standards of unprofessional conduct stated in §58-12-18, it was incumbent on the committee to promulgate rules adopting such standards of unprofessional conduct so that those subject to sections could conform their conduct to such standards

<sup>4</sup> The complexity of the subject matter to be regulated does not permit the same specificity as is required by the criminal law, of course, but it certainly permits greater specificity than the vague term "unprofessional conduct." The legal profession's code of professional conduct clearly demonstrates that reasonable specificity is possible in rules that regulate professions

rules defining unprofessional conduct to the Department which may then officially promulgate those rules. Specifically, §58-1-13 provides that the Department, upon the written recommendation of the appropriate representative committee, shall exercise the function of "(6), *defining* unprofessional conduct," except as herein otherwise provided" (Emphasis added). That the defining of unprofessional conduct by rule is contemplated by §13, rather than by an ad hoc adjudicatory process, follows from the language of that section itself and other statutory provisions. Section 13 is not phrased in adjudicatory terms at all. The duty of "defining unprofessional conduct" clearly contemplates the formulation of standards of unprofessional conduct by rule.

That conclusion is buttressed by §58-1-25, which provides that the "department of registration may upon the written recommendation of the appropriate representative committee . . . suspend or revoke any license" when the holder has been guilty of unprofessional conduct." That provision, on its face, contemplates an adjudicatory proceeding based on already defined standards of unprofessional conduct. The statutory scheme contemplated that the adjudication of the "specific charges" of unprofessional conduct had to be made under standards either promulgated pursuant to §58-1-13 or pursuant to the statutory definitions of unprofessional conduct stated in §58-12-18.<sup>5</sup>

There is a sound reason for defining unprofessional conduct of rules, even when the rules, because of the nature of the subject matter may have to be broad. A rule making procedure permits consideration of the viewpoints of all members of the profession, as well as the public at large.

---

<sup>5</sup> In 1981, after the hearing took place in the instant case, the Legislature revised the osteopathic licensing scheme and defined unprofessional conduct in even greater detail in §58-12-7 .....

Furthermore, the formulation of standards in a rule making proceeding is likely to be done in a more disinterested atmosphere than when it is the subject of an adjudicatory proceeding.

The general statutory obligation of representative committees and the Department of Business Regulation to promulgate rules was established in *Athay v. State, Department of Business Regulations*, Utah, 626 P2d 965 (1981):

The legislative grant of authority to the administrative is necessarily in general language. It is the responsibility of the administrative body to formulate, publish and make available to concerned persons rules which are sufficiently definite and clear that persons of ordinary intelligence will be able to understand and abide by them.

*Id.* at 968. That principle applies with at least as much force in the instant case as it did in *Athay*.

In attempting to distinguish *Athay*, the majority states that: "The Court required 'uniform, published, identifiable and objective standards' . . . In apparent recognition that prospective professionals who are making large investments of time and money are entitled to specific guidance as to what is necessary for professional certification" If one who is not yet a member of a profession is entitled to that degree of protection, I am at a loss to understand why one who has been in a profession and spent many years building his livelihood not only on his professional education but also on the experience and good will built up in the practice of that profession for a number of years is not entitled to the same, if not more, protection.

The majority's implicit contention that the public is entitled to greater protection after a professional is certified rather than at the time of the certification process itself

seems to create a distinction without any difference. The public's reliance upon the validity of the certification process, whether it is at the beginning of a professional career, or at some time thereafter, is exactly the same.

In dealing with such sensitive matters as state regulation of professions and vocations, the law must provide both for the protection of the public welfare as well as a person's right to due process of law before he may be deprived of practicing his chosen calling. *E.g.*, *Schwartz v. Board of Bar Examiners*, 335 U.S. 232, 238 (1951); *Lewis v. District of Columbia*, D.C., App. 385 A2d 1148 (1978). A principle central to the notion of due process of law is that a person should be given prior notice of proscribed conduct. *Lewis v. District of Columbia*, *supra*, at 1152. Due process, however, is not a concept so rigid that accommodation cannot be made for necessary variations which arise because of the different kinds of regulatory problems that must be addressed. A highly rigid approach that is insensitive to the complex nature of the regulatory problems involved is not constitutionally required. The regulation of professional and vocational conduct by a code as encompassing and as detailed as the Internal Revenue Code would be both stultifying to the profession or vocation and detrimental to the public. Sufficient latitude must be available to protect the public against incompetence and overreaching.

However, rules can and should be drafted which provide some guidelines more specific than the vague term "unprofessional conduct." Unless some specific meaning is infused into that term every practitioner or vocation could be placed in jeopardy for every out-of-the-ordinary act, even though it may represent a significant and valid advancement in the calling. Such rules need not diminish the public's right to be protected against new schemes and artifices.

Concededly, the courts have not been unanimous as to the degree of specificity required by statutes and rules regulating the practice of professions and vocations. However, I submit that those courts which have held that the term "unprofessional conduct" is unconstitutional as applied when there have been no limitations on the scope of that term, more fully recognize the nature of all the interests that should be recognized *E.g., Tuma v. Board of Nursing*, 100 Ariz. 74 593 P2d 711 (1979); *Megdal v. Oregon State Board of Dental Examiners*, 288 Or. 293, 605 P2d 273 (1980); *State Board of Dentistry v. Blumer*, 78 Mich. App 679, 261 N.W. 2n 186 (1977); *Lester v. Department of Professional & Occupational Regulations*, Fla. App., 348 So. 2d 923 (1977). I do not believe that administrative agencies should be given such far-reaching power over a right protected by the due process clause.

In sum, I do not agree that the actions of the representative committee and the district court in this case can be justified on the statutory basis relied upon in the majority opinion, especially when the representative committee was not properly constituted and the appellant did not receive the kind of judicial review in the district court required by statute. Had the representative committee and the Department of Business Regulation promulgated rules governing unprofessional conduct for osteopaths, as contemplated by statute, the case could be remanded for further consideration under those rules. But, because appellant was found guilty of unprofessional conduct on other standards, I submit that the revocation of his license is unconstitutional.

---

Durham, Justice, does not participate herein. Banks, District Judge, sat.

**APPENDIX "I"**

**IN THE SUPREME COURT OF THE STATE OF UTAH**

October 24, 1983

Director of the Department of Registration, et al.  
This day petition for rehearing denied.

**GEOFFREY J. BUTLER, Clerk**

**APPENDIX "J"****APPLICATION FOR STAY PENDING  
THE PETITION FOR CERTIORARI**

**ROBERT B. VANCE VS. PAUL T. FORDHAM,**  
Director of the Department of Registration, et al.

NOW COMES Robert B. Vance, his undersigned attorneys, M. Richard Walker, Esq., a member of the bar of this Court, and John A. Burges, Esq., a member of the bar of bar of the Supreme Court of the United States, and by way of application for stay pending filing of a formal application for review by the Supreme Court of the United States on certiorari says:

1. That counsel hereby and herewith certify pursuant to U.S.C. §2101(f) and Rule 44 of the Rules of Practice of the Supreme Court of the United States counsel will take and pursue a writ of certiorari to the Supreme Court of the United States to review the decision of this Honorable Court in the above cause rendered August 22, 1983, and the decision on rehearing denying the same issued by this Honorable Court;

2. Plaintiff is advised that significant issues of due process, raised in the dissenting opinion in this Honorable Court, raise substantial federal questions entitling Plaintiff to federal review.

3. Immediately following the order of this Honorable Court denying rehearing in the above cause agents of the State of Utah under color of a search warrant entered Plaintiff's premises and seized his license to practice and agents of the Defendants have indicated they consider his license to practice to be revoked even though the time to invoke review under 28 U.S.C. §2101(f) has not yet expired. The

review process is elongated and extensive and pending the same irreparable damage to Plaintiff's right would occur by failure to suspend the operation of the revocation of his license which was the subject of the opinion of this Honorable Court in the above entitled cause.

WHEREFORE, Plaintiff prays:

1. That a Justice of this Honorable Court will take jurisdiction of this request for staying pending certiorari;

2. That a Justice of this Honorable Court, without further hearing or notice, will forthwith issue a stay staying the effect of any revocation ordered by the Defendants of the license to practice as a physician within the State of Utah against the Plaintiff until such time as the full bench of this Honorable Court may hear and decide the issues raised by this application for stay.

3. That a Justice of this Honorable Court will forthwith issue an order to show cause to the Defendants, at a date to be set by this Honorable Court, why, pending petition for certiorari, the temporary stay issued by the Justice should not remain in effect until determination of the application for writ of certiorari of United States Supreme Court.

Done at Salt Lake City, State of Utah, this 2nd day of November, 1983.

---

M. RICHARD WALKER  
JOHN A. BURGESS  
Attorneys for Plaintiff

**APPENDIX "K"****STAY ORDER**

**ROBERT B. VANCE VS. PAUL T. FORDHAM,**  
Director of the Department of Registration, et al.

The above entitled matter came on regularly for hearing before the above entitled Court on the 2nd day of November, 1983, pursuant to the Plaintiff's notice of appeal filed herein, whereby the Plaintiff has appealed to the United States Supreme Court for a writ or certiorari, and further has moved the Court to issue an order to show cause requiring the Defendants to appear before this Court and show cause, if any they have, why the stay order should not be made permanent, pending the appeal before the United States Supreme Court and that the State Department of Registration has threatened to arrest the Plaintiff if he continues to practice pending the appeal, and to prohibit Plaintiff from practicing his profession pending the appeal; and the undersigned having been fully informed in the premises and concluding that, the Defendants are allowed to carry out the revocation and terminate the Plaintiff's practice, that the Plaintiff would be caused to suffer substantial and irreparable damage to his professional reputation and his professional practice which would make moot, the benefit of success on the appeal; now therefore,

**IT IS HEREBY ORDERED AS FOLLOWS:**

1. That all proceedings in the above entitled action are stayed, pending a hearing before this Court on the next law and motion calendar.
2. That pending the determination by this Court, the Plaintiff is entitled to continue his professional practice as an osteopathic physician and surgeon, in accordance with this Court's prior stay order issued January 6, 1982.

3. That the Defendants appear before the Court on the next law and motion calendar of the Court, then and there to show cause why the Court should not issue a stay order pending the determination of the Plaintiff's appeal to the United States Supreme Court.

DATED this 2nd day of November, 1983.

---

DANIEL I. STEWART  
Justice

**APPENDIX "L"**

**IN THE SUPREME COURT OF THE STATE OF UTAH**

November 7, 1983

**ROBERT B. VANCE VS. PAUL T. FORDHAM,**  
Director of the Department of Registration, et al.

This day Appellant's petition for stay is denied. However, a stay is granted to December 5, 1983, for the limited purpose of affording Petitioner an opportunity of seeking a stay from the United States Supreme Court.

---

**GEOFFREY J. BUTLER, Clerk**

**(THIS PAGE INTENTIONALLY LEFT BLANK)**